

No. 89-1793

Supreme Court, U.S.

FILED

AUG 8 1990

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CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS M. GAUBERT

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED

MAY 16, 1990

CERTIORARI GRANTED JUNE 18, 1990

# In the Supreme Court of the United States

OCTOBER TERM, 1990

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No. 89-1793

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v.

THOMAS M. GAUBERT

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*ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT*

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## JOINT APPENDIX

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\* The opinions and judgments of the district court and of the court of appeals and the order of the court of appeals denying rehearing are printed in the appendix to the petition for a writ of certiorari and have not been reproduced herein.

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS

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CA3-87-2989-T

THOMAS M. GAUBERT

v.

UNITED STATES OF AMERICA

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RELEVANT DOCKET ENTRIES

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DATE	NR	PROCEEDINGS
1987		
Dec 17	1	COMPLAINT SEEKING DAMAGES UNDER FEDERAL TORT CLAIMS ACT * * * * *
1988		
Mar. 18	10	MOTION OF THE USA TO DISMISS THE COMPLAINT
Mar. 18	11	MEMORANDUM IN SUPPORT OF MOTION OF THE USA TO DIS- MISS THE COMPLAINT RECEIVED EXHIBITS TO MOTION OF THE USA TO DISMISS THE COMPLAINTS (under separate cover)

(1)

DATE	NR	PROCEEDINGS
Mar. 22	12	AMENDED MOTION TO THE USA TO DISMISS[.] NO EXHIBITS RECEIVED AS INDICATED ON MOTION
Apr. 11	13	PLTF'S OPPOSITION TO MOTION TO DISMISS
Apr. 11	14	AMENDED COMPLAINT SEEKING DAMAGES UNDER THE FEDERAL TORT CLAIMS ACT
May 10	15	RENEWED MOTION OF THE USA TO DISMISS
May 10	16	MEMORANDUM IN SUPPORT OF THE RENEWED MOTION OF THE USA TO DISMISS & IN REPLY TO PLTF'S OPPOSITION TO ITS ORIGINAL MOTION TO DISMISS
May 23	17	PLAINTIFF'S OPPOSITION TO DEFENDANT'S RENEWED MOTION TO DISMISS * * * * *
Sep. 28	22	ORDER GRANTING MTN TO DISM . . . Court is of the opinion that the actions of which pltf complains fall w/i the discretionary function exception to the FTCA and therefore this court does not have subject matter jurisdiction over his claims. Ordered that deft's motion to dismiss is granted. cys to cnsl/dktd 9/30/88

DATE	NR	PROCEEDINGS
Sep. 28	23	JUDGMENT . . . Action came for trial before court on deft's mtn to dismiss and issues having been duly tried and a decision having been duly rendered. Ordered that pltf's complaint be dismissed. cys to cnsl/dktd 9/30/88
Oct. 13	24	MOTION TO ALTER AND AMEND THE JUDGMENT
Oct. 20	25	MEMORANDUM OF THE U.S. OF AMERICA IN OPPOSITION TO PLTF'S MOTION TO ALTER AND AMEND JUDGMENT
Nov. 10	26	ORDER DENYING MOTION TO ALTER AND AMEND JUDGMENT . . . that Pltfs motion to alter and amend judgment is DENIED cpy cnsl 11/14-dkt 11/15
Nov. 16	27	NOTICE OF APPEAL from Judgment of September 28, 1988. cpy cnsl. * * * * *

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

\_\_\_\_\_  
No. 88-1923

THOMAS M. GAUBERT

v.

UNITED STATES OF AMERICA

\_\_\_\_\_  
RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1988	
Nov. 18	Dup. Notice of Appeal and Clerk's Statement of Docket Entries
Dec. 1	Record on Appeal[,] No. of Vols. 2
	* * * * *
1989	
Jan. 10	Records Excerpts-Appellant
Jan. 10	Brief for Appellant
Feb. 10	Brief for Appellee
Feb. 28	Reply Brief for Appellant
	* * * * *
Jun. 8	Case Argued

DATE	PROCEEDINGS
Oct. 17	Opinion Rendered Flg. & Entg. Judgment Further, Gaubert's claim for the lost value of his shares is dismissed for lack of standing, and his claim for \$25 million in lost property is re- manded for further consideration
Oct. 27	Mot. for Ext.-Ext. to 11/30/89/ (Ap- pellee)
Nov. 30	Petition for Rehearing-Appellee Reg.
Nov. 30	Petition for Rehearing-Appellee En Banc
1990	
Jan. 5	Order Denying Rehearing
Jan. 16	Jdgt. as Mdt. Issd. to Clerk Record on Appeal Retd. to Clerk 2 vols
Apr. 2	Order of S.C. Ext. to 5/7/90
May 3	Order of S.C. Ext to 5/17/90
May 25	Notice of Flg. of Cert. Pet. on 5/16/90



UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

Civil Action No. 3-87-2989-T

THOMAS M. GAUBERT  
1120 WESTMORELAND ROAD  
DE SOTO, TEXAS 75115  
PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

AMENDED COMPLAINT SEEKING DAMAGES  
UNDER THE FEDERAL TORT CLAIMS ACT

Introduction

Plaintiff THOMAS M. GAUBERT brings this action against the UNITED STATES OF AMERICA for damages for the loss of his property interest in Independent American Savings Association ("IASA") due to the assumption of the day-to-day management of IASA by the Federal Home Loan Bank Board ("Bank Board"), Federal Home Loan Bank of Dallas ("FHLB-Dallas") and Federal Savings and Loan Insurance Corporation ("FSLIC"), and the negligent discharge of that assumed duty. At all times relevant to this action, the persons directing the management of IASA or actually managing the day-to-day operations of IASA were federal agents acting within the scope of their authority. This negligent management led to appointment of FSLIC as receiver for IASA on May 20, 1987 and led ultimately to the seizure of Gaubert's property.

Parties

1. Plaintiff Thomas M. Gaubert was, during the period in question, the largest single shareholder of IASA. Until late 1984, plaintiff Gaubert was Chairman of the Board of IASA.

2. Plaintiff Gaubert is a resident of Dallas County, Texas.

3. Defendant United States is liable for damages caused by the Bank Board, a federal agency charged with supervising the FSLIC pursuant to 12 U.S.C. §§ 1437, 1464, 1724-30, and the Federal Home Loan Banks (including the FHLB-Dallas) pursuant to 12 U.S.C. §§ 1421-49.

Jurisdiction

4. This action arises under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.* On May 20, 1987 an administrative tort claim was filed with the Bank Board on behalf of the plaintiff Thomas M. Gaubert; the Bank Board denied said claim by letter dated November 20, 1987.

Venue

5. Venue is proper in this district pursuant to 28 U.S.C. § 1402(b).

Facts

(Thomas M. Gaubert Acquires And  
Expands A Healthy Thrift)

6. In January 1983, Thomas M. Gaubert acquired controlling interest of Citizens Savings & Loan and caused that thrift's name to be changed to Independent American Savings Association. IASA was a Texas state-chartered

and federally-insured savings and loan association. Following that acquisition and until the time IASA was put into receivership on May 20, 1987, Gaubert was the largest shareholder of IASA.

7. From January 1983 through March 1986, IASA grew steadily while its financial health remained good. Financial statements issued during this period disclosed an upward trend in both assets and net worth. With the single exception of the last quarter of 1985, when a short-term surge in deposits forced IASA to exceed by a small margin the Bank Board/FSLIC growth standards, IASA's operations met all Bank Board/FSLIC net worth and growth requirements. The end-of-year surge in deposits in 1985 was attributable in large part to an \$80 million unsecured loan which IASA took from FHLB-Dallas.

8. At the end of 1984, IASA was a profitable savings and loan association. In June 1984 and for the last quarter of 1984, independent audits and examinations by federal and state regulators indicated that IASA met all regulatory requirements, including those for net worth and proper management.

9. In September 1985, the Board of Directors of IASA filed reports with the FHLB-Dallas indicating IASA's net worth to be \$54 million. The FHLB-Dallas did not object to, or seek any revision of, this net worth calculation at the time. In December 1985, IASA closed transactions on its belief that its net worth was approximately \$74 million.

10. In or about March 1986, employees of IASA's independent auditor, Arthur Young and Company, indicated for the first time that some downward adjustment in net worth for the fiscal year ending September 1985 might be appropriate. Arthur Young and Company suggested an adjustment of approximately \$18-20 million, leaving a positive net worth of approximately \$35 million.

11. From the time he acquired Citizens Savings in 1983 until the fall of 1984, Gaubert served as chairman of the board of IASA.

**(Federal Agencies Seek An Unprecedented  
"Neutralization Agreement" With Thomas M. Gaubert)**

12. The Bank Board and the FHLB-Dallas began to take over the operations of IASA when, in the fall of 1984, they sought Gaubert's removal from IASA. As a result of an investigation into a 1983 loan concerning an *Iowa* savings and loan, officials of the Bank Board and the FHLB-Dallas requested that Gaubert temporarily remove himself from IASA in *Texas*.

13. The "voluntary, temporary" removal was unprecedented; it was outside the agency's supervisory authority, and it detoured around Gaubert's elementary procedural rights because the Bank Board did not bring formal charges, and present clear and convincing evidence, in order to secure Gaubert's removal from IASA.

14. As part of the procedure, officials at the Bank Board and FHLB-Dallas also required that Gaubert *personally* guarantee that the net worth of IASA not fall below regulatory minimums. This too was unprecedented.

15. No other shareholder or officer or director of IASA was asked to (or did) sign any similar removal agreement, or any similar personal net worth guarantee.

**(Federal Agencies Seek To Merge IASA With Investex)**

16. At this same time, officials at the Bank Board and FHLB-Dallas were considering an application to merge IASA with another Texas savings and loan, Investex Savings, and to allow IASA to acquire branches from still another Texas financial institution, United Savings.



17. As part of this application, officials at the two federal agencies suggested that Gaubert contribute to the merger and acquisition transactions his personal interest in property at Poole Lake. Gaubert's interest in the property was valued at more than \$25 million.

18. No other shareholder or officer or director of IASA was asked to (or did) contribute any personal interest in property to the merger and acquisition transactions.

19. Officials at the federal agencies assisted IASA in its merger with Investex Savings and acquisition of branch offices from United Savings by providing regulatory and financial advice on how to accomplish the transactions. They advised IASA that it had to grow sufficiently to absorb the losses of Investex. They even advised IASA on how it should present the transactions to its shareholders for approval. One FHLB-Dallas employee helped phrase proxy statements disclosing Gaubert's "voluntary" removal agreement.

**(Federal Agencies Force Replacement of IASA's Management)**

20. Despite reports of IASA's positive net worth (which were never challenged by the Bank Board or FHLB-Dallas), IASA's Board of Directors received word from one of its counsel in February or March 1986 that officials at the FHLB-Dallas planned to engineer the replacement of that IASA's management and Board of Directors.

21. The Board of Directors was told that the FHLB-Dallas would close IASA if it did not actively cooperate with this plan. The Board of Directors of IASA reasonably believed that FHLB-Dallas would carry out its threats.

22. The FHLB-Dallas also told the existing IASA Board of Directors that it (the agency) would, and it

undertook the effort to, search for and select for IASA high caliber people, with experience and national reputations in the field, to become the new Board of Directors and officers of IASA.

23. At this time, IASA was not under any supervisory agreement with the Bank Board or FHLB-Dallas; there was no federal regulatory consent agreement of any kind in effect; there were no cease and desist orders pending; and IASA was not under any state or federal conservatorship or receivership. Consequently, neither the Bank Board nor FHLB-Dallas had any immediate legal authority to demand any directorship or management changes at IASA and went beyond their normal regulatory role by participating in and becoming the *de facto* decision-makers for the operations of IASA.

24. Bank Board and FHLB-Dallas officials enlisted Gaubert's assistance in taking over the operations of IASA. In February 1986 Gaubert was still under the terms of his "temporary" removal agreement. Under those terms, Gaubert was not permitted to interfere or participate in the operations of the thrift. Despite these provisions, officials at the FHLB-Dallas called Gaubert and said they would "free him" from the removal agreement so Gaubert could—as the federal agency requested—encourage the then-existing, independently-selected board of directors and officers to resign and to allow the Bank Board to manage the institution.

25. Gaubert complied with the agencies' request. He met with board members and officials at IASA, and did encourage them to cooperate with the Bank Board's plans to permit the federal agencies to hand-pick a board and officers, and to manage IASA.

26. No other shareholder or officer or director of IASA was asked to (or did) assist the Bank Board in forcing a change of management at IASA.



**(Federal Agencies Select, Install, And  
Indemnify Officers and Directors For IASA)**

27. Complying with the FHLB-Dallas's demand, and with the understanding that the Bank Board and FHLB-Dallas would be overseeing the operations of IASA, all IASA directors tendered undated resignations. This was the first time the FHLB-Dallas had ever demanded the resignations of directors of an insured institution without first initiating a proceeding aimed at a supervisory agreement. No such proceeding had been initiated for IASA.

28. During the last week in March 1986 or in early April 1986, the directors were informed by FHLB-Dallas that their resignations had been dated, accepted, and that they need not return to IASA. They were replaced in April 1986 by Thomas E. Hendricks, who became the new President and Chief Operating Officer, and Milton H. Thomas, who became Chairman of the Board and Chief Executive Officer of IASA. Hendricks and Thomas were both selected and approved by the FHLB-Dallas. Immediately prior to his appointment as an officer of IASA, Hendricks had been an employee of the FHLB-Dallas. Prior to his appointment at IASA, Thomas had been on the Board of Directors of the FHLB-Dallas. Hendricks and Thomas negotiated the employment and compensation packages for their positions at IASA with senior officials of FHLB-Dallas, rather than with the shareholders or managers of IASA.

29. On or about June 18, 1986, still under the FHLB-Dallas's threat to close IASA if it did not cooperate, and still not under any formal or recognized regulatory agreement with the Bank Board, the FHLB-Dallas hand-picked Board of Directors was elected.

30. Both Hendricks and Thomas were selected for IASA by FHLB-Dallas President Roy Green, and other

officials of the FHLB-Dallas. As with the selection of Hendricks and Thomas, all of the new directors were selected by officials of the FHLB-Dallas.

31. The officers and directors chosen by the Bank Board and FHLB-Dallas for IASA had little or had no previous professional experience as directors or officers of a savings and loan association or other financial institution, and none was of high caliber and national reputation. For example, Hendricks had never before worked for a savings and loan association and Thomas' only experience was as a senior officer of a thrift which was deteriorating at the time he was employed.

32. Notwithstanding this lack of experience, the FHLB-Dallas and Bank Board provided *each* of its hand-picked IASA officers and directors with an indemnification agreement backed by the FSLIC. The new directors would not have accepted the directorships without the FSLIC indemnification. One officer was even afforded retroactive indemnification for statutory and regulatory violations of his actions as an officer of IASA. This indemnification stripped from the FHLB-Dallas-chosen directors their inherent fiduciary responsibility to manage IASA with the association's best interests in mind. The indemnification agreements also assured that these individuals would remain loyal first to FHLB-Dallas, Bank Board and FSLIC—and only secondarily to the shareholders of IASA.

**(Federal Agencies Direct Day-To-Day Operations At IASA)**

33. In addition to engineering the resignation and replacement of IASA management with directors and officers of their choosing, officials at the FHLB-Dallas actively involved themselves in IASA's affairs and played an increasingly larger role at IASA. Through the actions of

senior officials of FHLB-Dallas and the Bank Board, a constant federal presence was achieved at IASA. As some examples,

a. FHLB-Dallas hand-picked management would often call or meet with FHLB-Dallas officials to consult as to day-to-day affairs and operations of IASA.

b. Minutes of IASA's Board of Directors meetings reflect that FHLB-Dallas officials were not only consulted, but actually participated in management decisions made at these meetings.

c. Through their hand-picked directors, the FHLB-Dallas and the Bank Board did not merely exchange information with IASA, but became involved in giving advice, making recommendations, urging, or directing action or procedures at IASA.

34. FHLB-Dallas officials (including FHLB-Dallas President Roy Green, FHLB-Dallas Director of Regulatory Affairs H. Joe Selby, and William O. Churchill, the FHLB-Dallas supervisory agent assigned to IASA) advised their hand-picked directors and officers on a variety of subjects. The FHLB-Dallas supervisory agent for IASA was instructed by FHLB-Dallas President Roy Green to attend every IASA Board of Directors meeting. As some examples of FHLB-Dallas' pervasive involvement,

a. FHLB-Dallas officials arranged for the hiring for IASA of consultant J.E. Robert Company, and other consultants on operational and financial matters and asset management.

b. FHLB-Dallas officials urged or directed that IASA convert from a state-chartered savings and loan to a federally-chartered savings and loan in part so that it could become the exclusive government entity with power to control IASA. The FHLB-Dallas hand-picked Board of Directors even recommended or advised conversion to a

federal mutual association—a thrift owned by its depositors rather than corporate shareholders—without consulting with the shareholders whose equity interest would have been compromised by such a change in the form of ownership.

c. FHLB-Dallas officials were actively consulted by the FHLB-Dallas hand-picked Board of Directors, and gave advice and made recommendations concerning whether, when, and how to place IASA subsidiaries into bankruptcy.

d. FHLB-Dallas mediated salary disputes between IASA and its senior officers.

e. FHLB-Dallas employees actually reviewed a draft complaint in litigation that its hand-picked Board of Directors contemplated filing. Those employees were so actively involved in giving advice, making recommendations, and directing matters related to IASA's litigation policy that they were able successfully to stall the Board of Directors' ultimate decision to file the complaint until the Bank Board *in Washington* had reviewed, advised on, and commented on the draft.

f. FHLB-Dallas employees actively intervened with the Texas Savings and Loan Department (IASA's principal regulator) when the State attempted to install a supervisory agent at IASA under a Texas State Savings & Loan Department Agreed Order. That intervention, in which FHLB-Dallas asked the State to defer the signing of a supervisory agreement, delayed the appointment of a State supervisory agent for IASA. Director of Regulatory Affairs H. Joe Selby reported directly to the Board of Directors at a Board of Directors meeting his success in postponing a meeting with Texas State officials and in preventing the signing of a supervisory agreement.

g. FHLB-Dallas President Green wrote correspondence to the IASA Board of Directors affirming



that his agency had placed that Board of Directors into office, and describing their mutual goal to protect the FSLIC insurance fund—with no mention of the directors' fiduciary responsibilities to IASA shareholders.

35. When Gaubert left his management position at the association in late 1984, IASA undoubtedly had a positive net worth which met all regulatory requirements. At the end of 1985, it continued to have a positive net worth.

**(Federal Agencies' Intrusion Causes IASA To Lose Millions)**

36. Within six months after the FHLB-Dallas had engineered the replacement of the existing IASA Board of Directors and effectively taken over the association, the FHLB-Dallas' hand-picked Board of Directors and officers announced that IASA had over a \$400 million *negative* net worth. This appalling turnaround occurred while IASA was under the management of the FHLB-Dallas hand-picked Board of Directors, and while the FHLB-Dallas itself played an ever-increasing role in the day-to-day operations of IASA.

37. Among the other actions taken by the Bank Board's hand-picked management at IASA was its writing down of various IASA assets—including the Poole Lake property that Gaubert put up as part of the Investex and United merger and acquisition transactions.

38. To the extent that IASA became insolvent and to the extent that IASA's financial condition violated Bank Board rules and regulations, those conditions were caused by the FHLB-Dallas's assumption of the duty to select the management of IASA, and the negligent discharge of that assumed duty. FHLB-Dallas was assisted in its assumption and negligent discharge of the duty by the Bank Board and FSLIC.

39. To the extent that IASA became insolvent and to the extent that IASA's condition violated Bank Board rules and regulations, those conditions were caused by the FHLB-Dallas's assumption of the duty to participate in, and to make, the day-to-day decisions at IASA and its negligent discharge of that assumed duty. FHLB-Dallas was assisted in its assumption and negligent discharge of the duty by the Bank Board and FSLIC.

40. On or about January 20, 1987, at the regularly-scheduled annual meeting of IASA shareholders, the FHLB-Dallas hand-picked slate of candidates for the Board of Directors was defeated in their attempt to be legitimately elected or reelected. The shareholders of IASA instead elected some of the former IASA directors, who had earlier served on the Board of Directors when IASA was a successful association, reporting positive net worth and assets.

41. From on or about January 20, 1987 until May 1987, FHLB-Dallas officials repeatedly requested that Texas State officials permit the Bank Board to close IASA.

42. On May 20, 1987, Gaubert filed with the FHLB-Dallas, the Bank Board, and the FSLIC an administrative tort claim alleging that these agencies had caused the ruin of IASA. Later that very same day, the Bank Board acted to cause Texas State officials to close IASA, and to place IASA into the receivership of FSLIC.

43. In a letter dated November 20, 1987, the Bank Board denied Gaubert's administrative tort claim and notified him that he had six months within which to institute suit under the Federal Tort Claims Act.

**COUNT I**

**(Negligent Selection of Directors and Officers)**

44. Plaintiff restates and incorporates paragraphs 1 through 43 of this Complaint.

45. FHLB-Dallas was assisted throughout the time period of this complaint by the Bank Board and FSLIC.

46. The FHLB-Dallas assumed the duty of care in selecting directors and officers to run IASA.

47. The FHLB-Dallas discharged this assumed duty negligently and breached this duty of care in selecting individuals who were inexperienced, unqualified, and unable to deal adequately with both routine financial and other unusual problems at IASA.

48. The negligent performance and discharge of this duty was the cause of the failure of IASA.

49. The negligent discharge of this duty, and the concomitant failure of IASA caused plaintiff Gaubert to lose his investment in IASA, which, in the first quarter of 1985 was worth \$75 million and his Poole Lake property valued at over \$25 million.

50. It was reasonable for the association and its directors, officers, and shareholders to rely on the officers and directors hand-picked by the FHLB-Dallas.

51. The circumstances of this case are such that if the United States were a private person, liability would be imposed under the laws of the state of Texas.

## COUNT II

### (Negligent Involvement in Day-to-Day Operations)

52. Plaintiff restates and incorporates paragraphs 1 through 43 of this complaint.

53. FHLB-Dallas was assisted throughout the time period of this complaint by the Bank Board and FSLIC.

54. Even after selection of the FHLB-Dallas hand-picked Board of Directors, the FHLB-Dallas improperly continued its involvement in the day-to-day operations of IASA.

55. The involvement of the FHLB-Dallas in the affairs of IASA went beyond its normal regulatory activity, and the agency actually substituted its decisions for those of the directors and officers of the association.

56. The FHLB-Dallas was so extensively involved in IASA that it was reasonable for the association and its directors, officers, and shareholders to rely on the decisions made by the FHLB-Dallas.

57. The FHLB-Dallas assumed the duty of care in directing the operation of IASA.

58. The FHLB-Dallas discharged this duty negligently and breached this duty of care in directing the operation of IASA.

59. The FHLB-Dallas-induced failure of IASA caused plaintiff Gaubert to lose his investment in IASA, which, in the first quarter of 1985, was worth \$75 million, and his Poole Lake property valued at over \$25 million.

60. The circumstances of this case are such that if the United States were a private person, liability would be imposed under the laws of the state of Texas.

WHEREFORE, Plaintiff demands damages in the amount of \$100 million, his costs and attorneys' fees, and such other relief as may be deemed just and appropriate by the Court.



Respectfully submitted this 11th day of April, 1988.

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# Supreme Court of the United States

No. 89-1793

UNITED STATES, PETITIONER

v.

THOMAS M. GAUBERT

ORDER ALLOWING CERTIORARI. Filed June 18, 1990.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

June 18, 1990